82-6555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. A-375

JAMES CURTIS McCRAE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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/jaf

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PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages 1 and 2 of the Petition.

QUESTIONS PRESENTED

1. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that the Petitioner is presumed innocent of the underlying felony involved in the felony murder violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

2. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that before the Petitioner can be convicted of felony murder, the underlying felony involved in the felony murder must be proved beyond a reasonable doubt violate the Sixtn, Eighth and Fourteenth Amendments to the United States Constitution?

3. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the trial court's failure to instruct on the elements of the underlying felony charged in the felony murder indictment violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner James Curtis McCrae was tried and convicted of first degree murder. The Florida Supreme Court affirmed the judgment and sentence. McCrae v. State, 395 So.2d 1145 (Fla. 1981). This Court denied certiorari review. McCrae v. Florida, 454 U.S. 1037, 70 L.Ed.2d 486 (1981). Thereafter, Petitioner

filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court urging that his appellate counsel had been ineffective and that the trial judge had improperly failed to explain the elements of the underlying felony in the felony-murder. 1/ The Florida Supreme Court rejected Petitioner's claim. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982). McCrae now seeks again certiorari relief in this Court.

Following the submission of evidence at trial, the trial court instructed the jury:

> "THE COURT: Ladies and Gentlemen of the Jury:
>
> You have listened carefully to the evidence and the argument of counsel. I now ask of you the same careful attention to the law, as determined by the Court, which you must apply to the facts as you find them from the evidence.
>
> You alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by this Court.
>
> (R. 822)
>
> * * *
>
> Count 2 of the indictment charges that one James Curtis McCrae did unlawfully and feloniously effect the death of Margaret Mears in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously lavish and carnally know a female of more than ten years of age, to-wit: Margaret Mears by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.
>
> (R. 823)
>
> * * *
>
> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

1/ Attached as Respondent's Exhibit A is a copy of McCrae's Petition for Writ of Habeas Corpus. Since this was the only instruction issue presented below, Questions 1 and 2 of the instant petition have not been preserved for subsequent review.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

(R. 830-831)

* * *

The Defendant has entered his plea of not guilty, and the effect of this plea is to require the State to prove each material allegation of the indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.

I charge you that it is to the evidence and to it alone that you are to look for such proof.

(R. 836)

* * *

I charge you that the defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. This presumption accompanies and abides with the Defendant as to each and every material allegation of the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond every reasonable doubt.

If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the Defendant the benefit of the doubt and find him not guilty; but if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the material allegations of the charges have been proved, then you must find him guilty.

To overcome the presumption of innocence of the Defendant and establish his guilt, it is not sufficient to furnish evidence

merely tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

(R. 836-838)

* * *

It is to the evidence introduced upon this trial and to it alone that you are to look for such proof."

(R. 839)

Defense counsel deemed these instructions to be unobjectionable. 2/

REASONS FOR DENYING
THE PETITION FOR WRIT OF CERTIORARI

As in Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982) and United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982), Petitioner waited several years before complaining about the adequacy of jury instructions in a trial at which he had no objection at the time. McCrae murdered Margaret Mears in October of 1973. Following the presentation of evidence at trial, Petitioner did not object to the trial court's instructions which Petitioner now challenges. Florida law requires a criminal defendant to object to instructions in the lower court to preserve the point for appellate review. Rule 3.390(d), Florida Rules of Criminal Procedure; Adams v. State, 412 So.2d 850 (Fla. 1982); Ashley v. State, 264 So.2d 685 (Fla. 1972). In addition, Petitioner did not attempt to raise as an issue on direct appeal the now complained of instruction. The Florida Supreme Court affirmed the judgment and sentence on October 30, 1980. McCrae v. State, 395 So.2d 1145 (Fla. 1981). Petitioner sought certiorari review which was denied. McCrae v. Florida, 454 U.S. 1037, 70 L.Ed.2d 486 (1981). Thereafter, Petitioner first challenged the given instructions in a habeas corpus petition in the Florida Supreme Court. Relief was denied. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982). Now, Petitioner seeks certiorari review

2/ Significantly, defense counsel's theory of defense was that Petitioner did not commit the homicide, not that a rape was not committed (R. 780, 818).

again. 3/

This Court has in recent years consistently maintained that federal habeas corpus courts should deny relief where a state prisoner has failed to comply with state procedural rules requiring timely and proper objection for preservation for subsequent review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126 (1976); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982). Similar results obtain for federal prisoners. United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982).

Secondly, Petitioner in the lower court urged not a federal constitutional question but only a question of state law, to-wit: whether the given instruction violated state law decisions, Robles v. State, 188 So.2d 789 (Fla. 1966) and State v. Jones, 377 So.2d 1163 (Fla. 1979). A petitioner may not initiate federal constitutional issues on certiorari. See Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 389 (1969). 4/

Third, Petitioner has failed to cite any decisions which hold that relief on a collateral attack to an unobjected to instruction such as in the instant case is available. In Henderson v. Kibbe, 431 U.S. 145, 52 L.Ed.2d 203 (1977), the Court opined:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', Cupp v. Naughten, 414 U.S. at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether 'the instruction is undesirable, erroneous, or even universally condemned', id at 146, 38 L.Ed.2d 368, 94 S.Ct. 396."

3/ Respondent respectfully submits that if Petitioner really seeks a second certiorari review from the affirmance of his judgment and sentence in the opinion reported at 395 So.2d 1145, he is obviously untimely.

4/ Petitioner may suggest that raising a federal claim on rehearing suffices. But it does not. Rule 9.330(a), Rules of Appellate Procedure, prohibits reargument on the merits. There is no reason why the Petitioner could not have asserted in his initial habeas petition all the grounds (based on state and federal grounds) to support his contention; Petitioner's failure to urge a federal basis for his claim below precludes review now here.

> In this case, the respondent's burden is especially heavy because no erroneous instruction was given: his claim of prejudice is based on the failure to give any explanation — beyond the reading of the statutory languages itself — of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law."
>
> (52 L.Ed.2d at 212-213)

As the Florida Supreme Court found, during the trial court's instructions to the jury, the trial judge read Count 2 which adequately described the underlying felony and its essential elements. 5/ 422 So.2d at 825. The Constitution commanded no more.

Petitioner is not aided by the decisions of this Court cited in his petition. In Taylor v. Kentucky, 436 U.S. 478, 56 L.Ed.2d 468 (1978), this Court reversed a judgment for the failure to give a requested jury instruction on the presumption of innocence and the circumstances of that case revealed a due process violation. Subsequently, in the decision of Kentucky v. Whorton, 441 U.S. 786, 60 L.Ed.2d 640 (1979), the Court explained that Taylor was a limited holding, confined to its particular facts:

> ". . . the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the Court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety. . .
>
> * * *
>
> . . . In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under Taylor, such a failure must be evaluated in light of the totality of the circumstances — including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors — to determine whether the defendant received a constitutionally fair trial."
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> (60 L.Ed.2d at 648)

In the instant case, there was no request for the now-desired instruction and Petitioner's guilt was overwhelming (his bloodied

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5/ The jury was also instructed that the material allegations of the indictment must be proved beyond and to the exclusion of every reasonable doubt.

fingerprints were left at the scene of the homicide).

Finally, Petitioner has not at any time raised the issue in a Florida court pertaining to the presumption of innocence instruction — not at the time of trial, not on direct appeal, and not even in his petition for writ of habeas corpus in the Florida Supreme Court. In short, there is no ruling on this point by the lower court subject to this Court's review. See Cardinale, supra.

It is clear that Petitioner presented below only a question of state law which was resolved adversely to him and that he seeks to have this Court review a matter of state law or to consider questions not submitted to or addressed by the lower court. Since no substantial federal constitutional question is presented, review of the order of denial of collateral relief by the Florida Supreme Court is inappropriate. The instant petition should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Robert H. Dillinger, Esquire, Akerson, Swisher, Dillinger & Brett, 1135 Pasadena Avenue South, Suite 140, St. Petersburg, Florida 33707 this 19th day of April, 1983.

Of Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS McCRAE,)

Petitioner,)

vs.) CASE NO. _____

LOUIE L. WAINWRIGHT,)
Secretary, Department of
Corrections, State of Florida,)

Respondent.)

_____)

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, JAMES CURTIS McCRAE, through his undersigned counsel and pursuant to Rules 9.031(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this honorable Court to issue its writ of habeas corpus, in the above-styled cause, and states as follows:

1. Petitioner was found guilty of first degree felony murder by the Circuit Court of the Twentieth Judicial, in and for Lee County, Florida, on April 18, 1974. On the same day, the penalty trial was held and the jury returned an advisory sentencing verdict of life imprisonment. On May 21, 1974, the circuit court sentenced Petitioner to death. A direct appeal was taken to this Court, which affirmed the judgment of conviction and death sentence in McCrae v. State, 395 So.2d 1145 (Fla. 1981).

Clemency proceedings were held before the Executive Clemency Board on December 16, 1981. The Governor signed Petitioner's Death Warrant on March 4, 1982. The Warrant is effective from Noon, March 25, 1982 until Noon, April 1, 1982. Petitioner's execution is currently scheduled for 7:00 A.M., Wednesday, March 31, 1982.

2. Jurisdiction of this Court is invoked pursuant to Article V, §3(b)(9), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. It involves the proceedings before this Court and thus, this Court's jurisdiction is properly invoked. See Knight v. State, 394 So.2d 997, 999 (Fla. 1981); cf. Foster v. State, 400 So.2d 1, 4 (Fla. 1981).

RESPONDENT'S EXHIBIT "A"

GROUNDS OF ILLEGALITY
OF PETITIONER'S CONVICTION
AND DEATH SENTENCE

3. Petitioner was denied the effective assistance of counsel in his direct appeal to this Court, in violation of the guarantees of the Sixth and Fourteenth Amendments where his appellate counsel failed to present to this Court a fundamental error which would require reversal of Petitioner's conviction. Such omission resulted in Petitioner being denied reasonably effective assistance of counsel as defined by this Court in Meeks v. State, 382 So.2d 673 (Fla. 1980) and Knight v. State, 394 So.2d 997 (Fla. 1981).

Specifically counsel failed to present to this Court the following issue:

> Whether the trial court committed fundamental error by its failure to instruct the jury in this felony murder prosecution that the elements of the underlying felony must be proven in order to support a verdict based upon felony murder and by its failure to define any underlying felony in its instructions.

Petitioner was denied effective assistance of counsel by the failure to present that issue, because had that issue been presented, the decisions of this Court would have compelled reversal of this cause for a new trial.

This Court's decision in Robles v. State, 188 So.2d 789 (Fla. 1966) is determinative. In Robles this Court held that failure to instruct on the underlying felony in a felony murder prosecution requires reversal regardless of whether trial counsel requested such an instruction. Robles was reaffirmed by this Court in State v. Jones, 377 So.2d 1163 (Fla. 1979) and Franklin v. State, 403 So.2d 975 (Fla. 1981). Proof of the underlying felony is an essential element of felony murder and thus failure to instruct upon the need to prove the underlying felony and to define the underlying felony constitutes fundamental error requiring a new trial.

In the present case, the trial court omitted any instruction on the underlying felony. The Court instructed the jury on first degree murder, in pertinent part as follows:

> Murder in the first degree: Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature of kidnapping.
>
> • • •
>
> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

(R 828-831). This instruction thus omitted any specification of or definition of an underlying felony to support a felony murder conviction. The instruction is therefore plainly inadequate and improper under Robles v. State, supra; State v. Jones, supra; and Franklin v. State, supra. The error in this case is not harmless under the rationale of Knight v. State, supra, because the evidence of premeditation was not sufficient.

Accordingly, Petitioner was denied the effective assistance of counsel in his direct appeal.

4. Petitioner was denied due process of law and a fair trial by the trial court's failure to instruct the jury upon the underlying felony in this felony murder prosecution. As discussed in the preceding paragraph, the instruction by the trial court on first degree felony murder was wholly inadequate under

Robles v. State, supra, and subsequent decisions. This error is fundamental, that is, it constitutes fatal error regardless of counsel's failure to object: "Counsel's failure does not relieve a trial court of the duty to give all charges necessary to a fair trial of the issues." Franklin v. State, supra, 403 So.2d at 976. Under Florida law, fundamental error can be raised and reviewed at any stage of the proceedings. E.g. Flowers v. State, 351 So.2d 387, 390 (Fla. 2d DCA 1975). Accordingly, since the error in this case is of constitutional dimension and is fundamental, this Court should reach the question on its merits at this time and should vacate the judgment and remand this cause for a new trial.

5. (a) The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, including Petitioner herein, without notice to these appellants or their attorneys, denied death-sentenced appellants due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the Fourteenth Amendment and its corporated guarantees.

The Supreme Court of Florida, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes, but is not limited to: pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries.

Except as to some of the pre-sentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys. Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it, has, at the Court's direction, been destroyed or purged from the Court's files. As a result, it is no longer possible to identify all of the cases in which such information was requested or received.

(b) In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), this Court decided this issue.

(c) Petitioner, JAMES CURTIS McCRAE's original appeal (and an associated appeal of a Rule 3.850 proceeding) was pending in the Supreme Court of Florida from June 20, 1974 (the date the Notice of Appeal was filed) until April 9, 1981 (the date the Petition for Rehearing was denied). Petitioner's case was pending in the Supreme Court of Florida during the time the practice of the Court described above was on-going.

WHEREFORE, Petitioner prays that this Honorable Court issue its order to show cause forthwith and issue a writ of habeas corpus ordering that Petitioner's judgment of conviction be vacated and he be granted a new trial, or in the alternative, that Petitioner be granted a full plenary appeal, in the above-styled cause.

STOLBA, LUMLEY & DILLINGER, P. A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 23rd day of March, 1982.

STOLBA, LUMLEY & DILLINGER, P.A.

By
ROBERT H. DILLINGER, ESQ.
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